BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The jurisdiction of this Court is clear.

Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65;

Judicial Code, Sec. 237, as amended by the act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28 U. S. C. A., Sec. 344;

Steeley v. Kurn et al., 313 U. S. 545, 61 S. Ct. 1087, 85 L. Ed. 1512;

Seago, Adm'x, v. N. Y. Cent. R. Co., 315 U. S. 781;

Stewart v. Southern Ry. Co., 315 U. S. 283;

Garrett v. Moore-McCormick, Inc., et al. (Dec. 14, 1942), No. 67, October Term, 1942, U. S. Law Week. (11 L. W. 4057), Vol. 11, No. 22.

II.

Respondent's testimony that while riding upon the top of the last car of a sixty-three car freight train moving south at about eight miles an hour, there was a sudden and violent stop which knocked or threw him a distance of eight or ten feet directly over the north end of the last car, to the ground between the rails of the track over which the train had been moving, is contrary to the physical law of inertia, wholly insubstantial and insufficient to make a jury question.

Dunn v. Alton R. Co., 340 Mo. 1037, 104 S. W. (2d) 311;

Scroggins v. Met. St. Ry. Co., 138 Mo. App. 215;

Daniels v. K. C. Electric Ry. Co., 177 Mo. App. 280;

St. Louis Southwestern R. Co. v. Britton, 190 F. 316; Rome Ry. & Light Co. v. Keel, 3 Ga. App. 769, 60 S. E. 468.

(a) Moreover, respondent says the train moved only a foot or two, if at all, after his fall (R. 74); and that he heard no noise of slack being taken up (R. 72), and felt no checking of speed, no jarring (R. 72), and there was no intimation of a stop (R. 64), prior to the stop.

This evidence, too, is directly in the face of common experience.

See authorities, supra.

III.

Respondent's own testimony is self-destructive because it is self-contradictory.

(1) He said the first intimation of the stop was a jar and then he was thrown off; that there was some noise (R. 64). He said later in his cross-examination that he heard no noise and felt no jar at all (R. 68). This is, of course, a clear contradiction.

(2) He stated that the train "stopped unusual, and buckled and twisted in every shape" (R. 48). On cross-examination he said he felt no jar (R. 68); the first thing he knew he was off (R. 68); the only thing that happened was that it suddenly stopped (R. 69); it was just a sudden stop (R. 69); "it was just that quick (indicating) and I was on the ground," just like the snap of your finger (R. 71). He said once that the train "buckled and twisted," and five times that nothing happened except a sudden stop. There is no possible way to reconcile these statements.

(3) The Court below says respondent testified he was "braced" when the shock came. That conclusion is based

upon respondent's statement (R. 61): "Well, a man generally braces, as well as he can brace himself." Assuming without conceding that this is sufficient to constitute a statement that respondent was "braced," it is in the face of his own testimony that he was standing on the wet, slippery runway on top of a box car, a picture of which, introduced by respondent and marked "Plaintiff's Exhibit G-1" (second picture opposite page 58 of the record), shows nothing on the top against which respondent might brace himself or to which he might hold, except a brake wheel. But as he was eight or ten feet from the end of the car when the shock came (R. 65), he could neither lean against nor hold to the brake wheel.

The only "bracing" possible then was by reflexly counteracting with his body the shock of the stop. As he was facing the rear end of the car he would have been compelled to lean backward to "brace" himself. The human spine does not admit of an appreciatively backward curvature; whereas leaning forward (towards the rear end of the car which respondent was facing) would have "braced" him in the wrong direction.

Respondent cannot recover when his evidence discloses one state of facts favorable to a recovery and another state of facts which bars a recovery, absent any explanation of the contradiction.

Adelsberger v. Sheehy (Mo. Sup.), 59 S. W. (2d) 644, 647;
Steele v. Railroad, 265 Mo. 97, 115;
Roehl v. Ralph (St. L. Ct. App.), 84 S. W. (2d) 405, 411;
Delorme v. St. Louis Public Service Co., 61 S. W. (2d) 247, 250.

IV.

The opinion of the Court below is based not upon the evidential basis, and contrary to well-known physical laws.

(a) Respondent's evidence is so self-contradictory on vital issues that any conclusion reached upon them cannot be based upon his evidence relating to those issues, but must necessarily be most highly speculative.

(b) The same is true of the statement of the Court below that: "There is substantial evidence to show that the first force applied in the stop did operate in the direction defendant says the law of inertia would operate"; and that "respondent was not thrown forward by it because he was braced against it."

(c) The Court below says further: "It does not seem unreasonable to believe that there would be some jerk back or rebound immediately thereafter from such a sudden stop."

From this statement that Court infers that respondent was thrown forward (but not with sufficient force to produce a fall) and that the rebound from the stop knocked him eight or ten feet in the opposite direction over the end of the car.

The factors which must be considered in arriving at this conclusion appear neither in respondent's evidence nor in that Court's opinion.

(d) The Court below impliedly admits that respondent's testimony does not support its opinion by saying that his story of the happening "was not as perfect a description as might have been made by a professor of English," but it was sufficient to show that there were forces operating in opposite directions.

(e) The Court below said: "It is true that plaintiff said it happened quickly (indicating with a snap of his fingers), but only such a sudden stop would likely have caused him to lose his balance."

Apparently the Court below places upon petitioner the burden of proving that respondent's fall was caused by

something other than the stop, despite the fact that respondent's own testimony proves conclusively that the stop could not have thrown or knocked him north, but unquestionably would have knocked him in the opposite direction.

These conclusions are very highly speculative, and are, therefore, unwarranted.

Gulf, Mobile & Northern R. Co. v. Wells, 275 U. S. 455, 72 L. Ed. 370, and cases cited;

P. R. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819;

Southern R. Co. v. Walters, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239;

C. M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041, 1045;

A. T. & S. F. R. Co. v. Toops, 281 U. S. 351, 354, 355, 50 S. Ct. 281, 74 L. Ed. 896, 899.

ARGUMENT.

I.

The jurisdiction of this Court can scarcely be questioned. The three cases hereafter discussed are directly in point. In fact, the only difference between the first two cases and the one at bar is that in those cases the petitions for certiorari were filed by plaintiffs and in the instant case the petition is filed by defendant.

Seago, Admrx., v. New York Cent. R. Co., 315 U. S. 781, was an action under the Federal Employers' Liability Act, which involved only one question, namely, was the evidence sufficient to make a jury question? The Supreme Court of Missouri held that the evidence was insufficient and that the trial court should have directed a verdict for defendant. Upon application, this Court granted its writ of certiorari and immediately upon the granting thereof handed down the following per curiam opinion:

> "On petition for writ of certiorari to the Supreme Court of Missouri, February 2, 1942, per curiam: The petition for writ of certiorari is granted and the judgment is reversed on the ground that there was sufficient evidence of negligence for submission to the jury. The case is remanded to the Supreme Court of Missouri for its consideration of other questions presented on the appeal and for further proceedings not inconsistent with this opinion."

Stewart v. Southern Ry. Co., 315 U. S. 283, involved the one question: whether or not the evidence was sufficient to warrant submission to the jury. Petitioner's decedent was crushed between the ends of two freight cars and killed while in the employ of respondent as a switchman. The Circuit Court of Appeals for the Eighth Circuit held the evidence insufficient to warrant submission to the

jury. This Court issued its writ of certiorari and following oral argument reversed and remanded the case, saying, on page 286:

> "We hold that, on this record, neither party is entitled to prevail. If the issue as to the condition of the coupler mechanism was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject."

This Court said, on December 14, 1942, in Garrett v. Moore-McCormick Company, Inc., et al., No. 67, October Term, 1942, 11 L. W. 4057, 4058:

> "So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so, raises a federal question reviewable here under Sec. 237 (b) of the Judicial Code, 28 U. S. C. A., Sec. 344 (b)."

II.

Respondent's story of how and why he was injured is directly contrary to the law of inertia, viz., that a mass once set in motion will continue in the same direction and at the same velocity unless acted upon by some other physical law.

For convenience we repeat briefly the basic facts surrounding the incident:

> (1) A sixty-three car freight train moving south (assumed for convenience) at six or eight miles an hour.
>
> (2) Respondent standing on the top of the last car in the train, where the footing was insecure because of rain and sleet and snow which melted as it fell, holding to nothing and leaning against nothing.

(3) A violently sudden stop which threw or knocked respondent north a distance of eight or ten feet, over the rear end of the last car and to the ground between the rails.

(4) He was not thrown or knocked towards the south, the direction of the train movement, although he said once in answer to a highly leading question that he was "swung" towards the south; but did not say he lost his balance at that time.

These statements unquestionably cannot be true. They are equivalent to saying that one riding in an automobile will be thrown over the back of the seat when the automobile stops suddenly; or one standing on the floor of a truck will be thrown over the rear end of the truck rather than towards the cab of the truck.

Respondent stated positively that the train moved not more than a foot or two, if at all, after he was knocked off. This is probably true as it is corroborated by a disinterested witness; but obviously this statement is too utterly fantastic to be credible if we are to accept respondent's story that he was knocked off the car by a sudden stop. This very slight, if any, movement of the train clearly contradicts his statement that he was knocked off the train, but supports petitioner's theory that because respondent had completely lost the sight of his left eye (R. 90, 91), he fell over the end of the car while in the act of descending from the top of the car. No other theory is consistent with respondent's corroborated assertion that the train moved only a foot or two after he fell.

Respondent is, of course, bound by his testimony and cannot seek recovery upon any theory inconsistent with it. He says positively, time after time, that nothing happened except a sudden and violent stop, which knocked him eight or ten feet over the rear end of the car. If, therefore, his testimony is contrary to the law of inertia, the judgment of the court below cannot stand.

He was not leaning against anything; he was not holding to anything; no part of his body was touching anything except his feet, which were on the runway on top of the freight car. It is quite true that he says the train was "in a curve." But his photograph, Exhibit B-1 (second picture opposite p. 54 of the record), shows that at the point of injury and for a long distance south the track was perfectly straight. The only interpretation of his testimony not contradicted by his own photograph discloses that what he meant was that the engine was on a curve, whereas the remainder of the train was on straight track (R. 66). But if we grant that the entire train was on a curve, it makes no difference. Respondent was not thrown from the car by any side-sway, or over the side of the car, or even over a corner of the car (R. 67, 69). He landed between the rails of the track over which the train was running, directly behind the middle of the end of the car and only about five feet away from the wheels (R. 68). Consequently centrifugal force was wholly inoperative.

It is also true that respondent says "a man generally braces himself" (R. 61); he does not say what he means by that. By his own admissions, however, he was not "braced" by holding to or leaning against anything.

The only possible interpretation to be placed upon this language is (conceding for argument only that he meant he was "braced" on this occasion) that he referred to his reflex muscular action after he felt the shock. He repeatedly stated that he had no warning of an impending shock (R. 68, 69), and, therefore, could not have realized there was any necessity for "bracing" himself. One cannot prepare for a wholly unexpected contingency.

Obviously he was not leaning backward towards the north, in the opposite direction from the movement of the train. We know that one standing up on the top of a fast moving train sometimes leans forward toward the front

of the train to counteract the air pressure created by the movement of the train. But no such thing is necessary when the train is moving only six or eight miles an hour. Moreover, had respondent been leaning (braced) towards the south, it not only would not have helped him to maintain his balance, but would have thrown him south more precipitately than had he not been leaning in that direction, because the center of gravity of his body would have been farther south than his feet and farther south than had he been standing straight.

Had he been leaning backwards towards the north (which no one could or would ever do—in the opposite direction from the movement of the train), the center of gravity of his body would have been farther north than his feet and farther north than had he been standing straight. But even so, he would have been thrown south rather than north, although the fact that he was leaning north would, to some slight extent, have counteracted the force of the stop and respondent would probably have moved a shorter distance south than he would had he been standing straight or leaning south. In other words, a sudden stop could not possibly have thrown him north, but would have thrown him a greater distance south had he been leaning in that direction or had he been standing straight, than had he been leaning north. Therefore, it is certain that, while standing on top of the box car with nothing to lean against or hold to, respondent could do nothing, except by muscular reflex action, which could possibly counteract, modify or affect in the slightest degree the law of inertia, and he could not by his own efforts have prevented himself from being thrown south rather than north by the alleged sudden stop of the train.

Consequently, if the law of inertia was to any extent affected, it must have been by unintention and as a result of some other natural force. What natural forces could possibly have affected respondent as he stood there? It is

possible to conceive of but three: (1) the stopping of the train, (2) the increasing of its speed, and (3) centrifugal force. Because the car upon which he was standing was moving upon a tangent rather than a curve, centrifugal force is automatically eliminated. Moreover, had respondent been affected by centrifugal force, he could not possibly have been thrown directly over the north end of the car as he says he was; but he would have been thrown towards the outside of the curve (which, according to his photograph B-1, was not in existence).

Then we have remaining but two possible modifying or interacting forces, viz., (1) the stopping of the train, and (2) the increasing of its speed. Respondent's own testimony eliminates the second (R. 69). Thus, according to both logic and respondent's testimony, the only possible interference with the operation of the law of inertia was the sudden (he says) stopping of the train.

It is true he attempted to say there was some "swaying" of the car; but he repeatedly stated that there was no increase of speed and no movement of the train or car except a sudden stop (R. 69); such a sudden stop, indeed, that the train did not move more than a foot or two, if at all, after he fell (R. 74). But, even if we should concede a "swaying," that fact would not and could not affect our problem, because respondent's very positive testimony is that he fell directly over the end of the freight car and landed between the rails of the track over which the train was passing (R. 67); not over the side or even the corner of the car.

It must be borne in mind, also, that respondent was standing perfectly still on the runway on top of the box car. Consequently the law of inertia was in no wise affected by his intention. If it was modified or counteracted in any manner, it must therefore have been by unintention. Having excluded any intentional act upon his part, as well as any possible "swaying" of the car, any

increase in the speed of the train, and centrifugal force, we are inevitably forced by both logic and respondent's own testimony to the conclusion that the stopping of the train was the only theoretically possible modifying force affecting the law of inertia. Is his story consonant with that law?

Respondent's testimony is that by the sudden stopping of the train he was suddenly thrown north in the opposite direction from which the train was moving. If this testimony is true, then inevitably some physical law other than inertia and which has not yet been discovered, must have been responsible for his fall. This we purpose to demonstrate conclusively.

His own evidence places him standing still on the top of a box car which was moving south (to avoid confusion, we say south rather than southeast or east). He was facing north, northeast or northwest, depending upon which portion of his testimony is considered. In his deposition he said he was facing directly north. On the trial he changed it to northwest. In any event, he was, for all practical purposes, facing the direction opposite to the train's movement. A sudden increase in the speed of the train would have compelled him to move his feet towards the north in order to maintain his balance, otherwise his feet would have commenced suddenly to move south faster than the remainder of his body and, unless he was able to move his feet towards the north fast enough to keep them directly under the center of gravity (his body) he would have fallen towards the north. This is the daily experience of those who ride street cars, busses, or railroad trains. The operation of this physical law is certain, uniform and immutable. But respondent's testimony is that the only force (an increase in the speed of the train) which could have caused him to fall off of the car towards the north (as he maintains he did), not only was not applied, but that exactly the opposite force was ap-

plied, namely, the train was suddenly stopped; and, moreover, stopped so suddenly that it moved only a foot or two, if at all, after he was thrown. Necessarily the stopping of the train would have exactly the opposite effect upon his body. If the train had been suddenly stopped, as respondent says it was, that would undoubtedly have forced him to step towards the south, the direction in which the train was moving, in order to maintain his balance, because, if he took no step towards the south, the sudden stopping of the train would have stopped the southward movement of his feet, whereas his body would have continued to move south and he would have fallen towards the south, and could not possibly have fallen towards the north. Therefore, if he fell north, over the north end of the box car, necessarily the speed of the train must have been accelerated (assuming for argument only that any movement of the train affected his fall in any way). Respondent is emphatic that the speed was not increased, and he cannot now take the opposite position. Unless he was caused to fall by the sudden stopping of the train, respondent cannot recover, because he pleaded and testified that the sole cause of his fall was a sudden stop; and testified positively that there was no sudden increase in speed.

There is no possibility of doubt about these conclusions, and no amount of argument can change the operation of these forces. In other words, the sudden stopping of the train would have applied the controlling force first to his feet, which would have stopped moving south. Then the center of gravity would have been suddenly shifted in the direction in which the train was moving, causing the upper part of respondent's body to move south with proportionate suddenness.

On the other hand, a sudden increase in the speed of the train would correspondingly have applied the controlling force first to his feet, which would have commenced to move

south at a more rapid speed, thereby suddenly shifting the center of gravity of respondent's body north, in the direction opposite the movement of the train, and would inevitably have caused his body to fall towards the north or over the end of the box car—as he says he fell.

The correctness of these conclusions is illustrated perfectly by the result of a sudden application of one's automobile brakes. According to respondent's theory, if he had been standing on the floor of an automobile truck which was moving south, and the driver had suddenly applied the brakes, respondent would have been thrown over the end gate of the truck instead of up against the cab of the truck or through the windshield. Common experience tells us that when one is riding in an automobile upon which the brakes are applied in emergency or which collides head-on with an obstacle, he is thrown through the windshield rather than against the back of the seat (the back of the seat being in this case the north end of the box car). Thus it is demonstrated incontrovertibly that respondent's tale of how he was caused to fall north over the end of the box car is in direct contradiction of physical laws known to and experienced by all of us every day.

The Court below recognized the immutability of these physical laws in Dunn v. Alton Railroad Company, 340 Mo. 1037, 104 S. W. (2d) 311, the facts in which are briefly as follows:

Plaintiff was riding on a train which was going around a left curve from east to north, but that portion of the train upon which he was riding was, for all practical purposes, moving north. Plaintiff left his seat and was walking south (opposite the train's movement) when there was a sudden decrease in the speed, which he claimed threw him south, followed by a sudden increase in speed, which threw him north, and then a jerk, which threw him through a vestibule door out of the car on the inside of a curve.

The Court below reversed the trial court on the ground that plaintiff's evidence was contrary to physical law: that, when the train was moving north, a sudden decrease in speed would necessarily have thrown him north instead of south (as he claimed); a sudden subsequent increase in speed would have thrown him south instead of north (as he claimed); and that centrifugal force would necessarily have thrown him towards the outside of the curve rather than the inside (as he claimed).

The only difference between the Dunn Case and the case at bar is that Dunn's train was moving north and petitioner's train was moving south. The Dunn Case is, therefore, directly in point and is in strict conformity with the physics of our situation.

The Kansas City Court of Appeals in Daniels v. K. C. Elevated Railway Co., 177 Mo. App. 280, passed on the question in a case in which plaintiff claimed that as he was boarding an eastbound street car, and while he was standing on the lower step the car started east before he had time to get into the car. As he was on the south side of the car, he was necessarily facing north. His testimony was that when the car started east with a quick jerk it threw him east with the car, his head to the east, his feet to the west and his body practically parallel with the track.

That court held, following Scroggins v. Met. St. Ry. Co., 138 Mo. App. 215, that plaintiff's evidence was contrary to physical law and was therefore incredible. In the course of the opinion the court said:

> "But if the plaintiff's deliberate account of the matter is clearly contrary to natural law—contrary to what is called physical facts—we will refuse to credit it (Scroggins v. Met. St. Ry. Co., 138 Mo. App. 215). That case finds full application in this one and must control it. If, as plaintiff says, he stepped up on the step, not holding to anything, except his valise and sword, and the car suddenly started forward with a

jerk, it would, of course, have jerked his feet forward and his body would have been thrown backward with his head to the west. In the Sroggins case it was said that 'plaintiff had released her hand hold and without other support than her footing was stepping to the street. How could the sudden starting of the car, when she was in that position, have the effect of throwing her head-first in the direction in which the car was going? The natural result of such start would have been to jerk her feet towards the east and to pitch her body in the opposite direction, . . . The only modifying force that could have given a different direction to her fall would have been her subconscious efforts to counteract the sudden force exerted against her. Manifestly such involuntary and unsupported efforts could not have produced a counteracting force so pronounced as to overcome the impetus given her body in a direction opposite to that it, otherwise, would have taken.'"

In St. L. S. W. Ry. Co. v. Britton (8), 90 F. 316, plaintiff was sitting in a railway coach seat alone and near the aisle. The front trucks of the tender were derailed.

"Plaintiff testified that the train stopped with such a sudden jerk or jolt that she was thrown against the window sill and her left side and back injured. When the train stopped the male passengers got out of the car to ascertain the cause of the stoppage. There were three lady passengers in the coach in which she was sitting. They (with plaintiff) got up, walked to the rear of the coach, and looked out to see if they could ascertain why the train had stopped. In about fifteen minutes the wheels were replaced on the rails and the train started. After returning to her seat, and after the train had started, the motion of the car made her sick. Her illness seemed to increase before the train reached Little Rock, and she received attention from some of the other passengers. On reaching Little Rock she was taken to a hospital, and has been attended by physicians since. She claims that the injury

resulting from her being thrown against the window sill injured her back to such an extent that her lower limbs have become in a measure paralyzed. At the trial she was brought into court on a stretcher, and demonstrations were made to establish the paralyzed condition of her limbs by sticking pins into them in view of the jury.

"As to whether or not the car stopped in a sudden manner, so as to throw her against the window sill, her testimony stands alone, unsupported by that of any other. In addition to the trainmen, who testified that the train stopped by slowing down gradually, nine passengers upon the train also testified that there was no sudden stop, jerking, or jolting of the train. One of the passengers testified that he was looking directly at her when the train came to a stop, and that she was not thrown against the window sill. Another one was writing, and observed nothing unusual until the train stopped. While the burden was upon the plaintiff to establish her injury by a preponderance of the testimony, the preponderance is not determined by the number of witnesses alone; and, were this all, we might not be inclined to disturb the verdict of the jury, who saw the witnesses and observed the manner in which they gave their testimony. But it is apparent, from a consideration of the physical facts, that plaintiff is mistaken. She was sitting in the seat, she testified, facing in the direction the train was going. She was not sitting next to the window, but near the aisle, and a sudden stopping of the train would have precipitated her forward, not thrown her sideways some distance to the window. Sitting where she was, had she been suddenly thrown sideways against the window sill, she would not have been struck in the side and back below the ribs, but much higher up, at or about the shoulders."

The Court of Appeals of Georgia passed on the question in Rome Ry. & Light Co. v. Keel, 3 Ga. App. 769, 60 S. E. 468, wherein plaintiff's petition alleged that he signaled

the motorman to stop the street car, but before the car had come to a complete stop he boarded the step of the front platform; that the motorman had applied the brakes for the purpose of stopping the car, and when he saw plaintiff moving from the step of the car to the platform the motorman released the brakes; that the car "jumped forward, and jerked, knocked and threw the plaintiff off the car," injuring him.

Defendant's demur to the petition was sustained upon the allegation in the petition last above quoted, viz., that the car jumped forward. The Georgia appellate court, in affirming on the ground that it was a statement of a violation of physical law, that merely releasing the brakes of a car would not cause it to jump forward, said:

> "The case rests solely upon the proposition that a release of the brakes caused the car to jump forward with a jerk; a proposition wholly contradictory of the laws of physics and to ordinary experience. Leaving out of consideration external causes, including condition of the track, curves, etc., we dare say that no motorman can impart a jerk to his car by releasing his brakes or by throwing off his current. Jerks and jolts come from throwing on the brakes or the current, active forces that tend to disturb the inertia.
>
> "The only forces tending to propel a car when the current is off are its momentum, and, if the track be downgrade, gravity. Opposed to both of these forces is friction. We will first consider the car to be running on level ground. Here the momentum is gradually expended in overcoming the friction, and the car will slowly stop. The application of brakes increases the friction, so that the momentum is more quickly overcome, and the speed undergoes a rapid reduction. If you release the brakes—i. e., remove the excess friction—you do not add to the momentum. You merely subtract from the friction, and there results not an increase of speed, a jumping forward of the car, but merely a constant, but less rapid, reduction

of speed. If the car is running downgrade, gravity, as well as momentum, is opposed to friction, and may be strong enough to keep the car in motion, and to accelerate it despite the friction. In this case, as in the other, the application of brakes by adding to the friction tends to overcome the forces of gravity and the momentum of the car, and a reduction of speed ensues. If, now, the brakes be released, there may result, not only a diminution in the degree at which the speed is being reduced, but an actual acceleration of the car; but now, as before, there can be no sudden jerk, for gravity, through a well-known law, produces a uniform acceleration. Under these laws of nature of which the court must take judicial notice, a sudden jump or jerk of the car cannot be produced by merely throwing off the brakes. Something else must concur to produce these effects. We are made surer that this *a priori* reasoning is not fallacious by the corroboration of actual personal observation, though the judgment of the court must rest upon the application of the physical laws and not on the personal experience, for knowledge of the latter nature cannot extend the court's judicial cognizance. By experiments personally observed by the writer through the courtesy of a local motorman, he finds that, when the current is not on, the releasing of the brakes does not, whether on level ground or on downgrade, produce any sudden jerk or jump of the car. On downgrade there is usually a smooth gradual acceleration. On level track, by an illusion, the car seems to gain speed when the brake is first released, but closer observation shows that, in fact, there is no acceleration, but only a change from rapid to slow reduction of speed. Thus *a posteriori* we reach the same result to which our *a priori* reasoning led, that it is physically impossible that a release of the brakes alone could have produced the result claimed; and no other cause is shown. We may say, further, that after our minds reached this conclusion we submitted the opinion for verification to the professor of physics in one of the leading technical institutions of the country, and he

says in reply: 'You are entirely correct in your reasonings and deductions as indicated in your paper which I enclose. The laws of physics justify the conclusions you have arrived at.' "

III.

Respondent's testimony is so contradictory and self-destructive as to be wholly valueless.

To avoid repetition, attention is called to sections II, V and VI of petitioner's motion for a rehearing filed in the Court below, in response to which that court wrote a brief opinion reaffirming its original opinion. Both the motion for rehearing and the opinion in response thereto appear in the transcript of the record filed herewith (R. ..).

(a) Respondent's testimony that the stop was so sudden that the sixty-three car freight train moved, if at all, only a foot or two between the time he was knocked off and the time he was picked up by the disinterested witness (R. 74); that he heard no noise of the taking up of slack between these sixty-three cars by this stop so violent that it was made at most within a foot or two (R. 72); that he felt no checking of the speed and no jarring (R. 72), and had no notice of the train's stopping (R. 72), is ludicrously preposterous.

IV.

Examination of the opinion of the Court below, in the light of the record, will demonstrate conclusively that it is based wholly upon speculation and conjecture.

(a) In the first place, respondent's evidence is so self-contradictory, as heretofore shown, that any conclusion reached upon it must necessarily rest upon conjecture. When respondent says in one place that he heard a noise (R. 64) before the crashing stop, and in another that he

heard no noise (R. 68), how can one determine, without entering the domain of conjecture, whether or not he heard a noise prior to the stop? When respondent says in one place that the train "jerked and swung around, and wrastled around" (R. 61), and in several other places that nothing whatever happened except that he was knocked a distance of eight or ten feet directly over the end of the box car (R. 68, 69, 71), how can it be determined, without crossing the border into speculation, whether or not there was any movement of the train other than a sudden stop?

(b) The Court below says:

> "There is substantial evidence to show that the first force applied in the stop did operate in the direction defendant says that law of inertia would operate but that plaintiff was not thrown forward by it because he was braced against it."

This statement is not supported by any substantial evidence in this record. It is quite true that in a single instance respondent said, in answer to a highly leading question of his counsel, that it "swung" him towards the front (R. 61). But he said at numerous other times throughout his testimony that nothing at all happened except that he was knocked directly over the rear end of the car (R. 68, 69, 71). Can the Court below say that respondent was correct in the single instance and incorrect in the several other instances which squarely contradict the one? Any conclusion that he was "swung" south is obviously based exclusively on speculation. It cannot be based on the evidence, because the evidence is directly contradictory.

Nowhere is the rule applicable to this situation better stated than by Faris, J., while a member of the Court below, in the case of Steele v. Railroad, 265 Mo. 97, 117:

> "But when no explanation or excuse for the variance is given, as in the instant case, the matter of the

probative effect of such bald contradictions ought to be left to the court to be passed on as a matter of law. What in such case is there for a jury to pass on? Why should the self-serving statements of today, favoring interest, have more probative weight than the admissions of yesterday against interest? If there be a reason in the whole realm of law or logic making for any such distinction it is inscrutable; especially in a case where, as here, there is no testimony whatever as to the time when and the place where plaintiff stepped upon the north track save and except that of the plaintiff himself. Suppose the action had been upon a promissory note, and on May 23, 1911, plaintiff suing as payee, had solemnly testified that the note had been paid to him in full; but on the next day had gone upon the stand apropos of nothing, and vouchsafing no excuse for his previous testimony, had said the note had not been paid; the inference in such case would be either insanity or perjury; the former of which destroys the competency, and the latter the credibility of a witness (Secs. 2022 and 6362, R. S. 1909). The case presented is not one of a mere verbal discrepancy arising, it might be, from the manner of speech of the witness, but a vital and fatal variance made, so far as the last above quoted excerpt and whole context shows, deliberately."

Why should respondent's statement that he was swung towards the front end of the train have any more probative weight than his repeated statements that nothing happened except the sudden stop, that there was no decrease or increase of speed, that he heard no noise, felt no jar, and nothing whatever happened except a sudden and violent stop which affected him in no other way than to throw him violently eight or ten feet towards and off of the back end of the car upon which he was riding? Respondent can scarcely take the position that he was insane while testifying. There is left, therefore, under the Steele opinion, nothing except perjury to explain his contradictions.

(c) The opinion of the Court below says further:

> "It does not seem unreasonable to believe that there would be some jerk back or rebound immediately thereafter from such a sudden stop."

It is quite true that such a belief is not unreasonable under proper conditions. But what are those conditions? This record does not inform us. Has the length of the train anything to do with it? If so, what? Has the speed of the train anything to do with it? If so, what? Has the condition of the rail, wet or dry, anything to do with it? If so, what? Has the air pressure in the brake line anything to do with it? If so, what? Has the character of the train, whether passenger or freight, anything to do with it? If so, what? Has the weight of the train anything to do with it? If so, what? This record is completely silent upon these possible, and even probable, modifying forces. May the Court below, with no knowledge whatever of the effect of these different factors, base its opinion upon the assumption that under the circumstances here in evidence none of these forces did in any way control or affect the situation, without speculating upon what they were and what their effect was? It might be warranted in assuming that given a particular set of circumstances which covered all of the factors which would bear any relation to the question of rebound, there would be some definite rebound. But the Court below went further than the mere assumption of a rebound, and assumed further that the initial force of the stop would not throw respondent forward with sufficient force to cause him to fall, whereas the rebound would be sufficiently severe not only to cause his fall, but to cause him to be thrown or knocked a distance of eight or ten feet and over the rear end of that train, and so rapidly that respondent illustrated it by snapping his fingers. Respondent does not say that while he was being thrown or knocked that distance he was

running or stepping in an effort to regain his balance. It is only fair to assume, therefore, that he did not take any steps, but was knocked or thrown, as he says, directly off the car, by the primary shock of the sudden and violent stop. The Court below says not by the sudden stop, but by the rebound. He goes to the jury on one theory: the court below affirms upon another and contrary one, i. e., he goes to the jury on the theory he was knocked off by the stop, whereas the Court below affirms on the theory he was knocked off by the rebound produced by the stop.

There can be no possibility of doubt that the force or shock of the stop (primary) was materially greater than the force or shock of the rebound (secondary). To avoid the inevitable consequence of this unanswerable fact the opinion of the Court below says that respondent was "braced" against the primary shock of the sudden stop, but was not "braced" against the shock of the rebound, despite the fact that there was nothing on the top of the car to take hold of or to lean against. The only "bracing" possible then was by means of his subconscious muscular control of his body, and that would necessarily be produced by and follow, rather than precede, the shock. As he was facing north and the train was moving south, the only possible effective manner of bracing his body would have been to lean backwards toward the south. Whether or not he could have done this successfully is most highly speculative, at least in the absence of any testimony as to if and just how it was done. Moreover, in view of respondent's repeated assertions that he had no warning of the impending stop, heard no noise, felt no jar, how was it possible for him to be "braced" in any way? He knew of no necessity for "bracing" himself, according to his own evidence. Even the assumption of the Court below that he was "braced" is speculative, because while respondent did say that "a man generally braces himself," he stated time after time that he had no warning of the coming stop,

heard nothing to indicate a checking of the train's speed, felt no such thing, and did not even feel a jar (R. 68). Did he, or did he not, then, "brace" himself? Could he have "braced" himself even though he had received warning of the impending stop? He knew no facts which advised him that it would be well to "brace" himself. Against what force? And to be applied in which direction?

(d) The Court below says, in its original opinion, that the jury might reasonably have found "that plaintiff would not be thrown down forward when braced against a force operating in that direction, but could, because of the violence of that force and slick condition of his footing, lose his balance so as to be thrown off the end of the car by subsequently acting forces," etc.

We have discussed, supra, (c), the assumption that respondent was "braced." What about the speculation that respondent could "lose his balance" because of "the violence of that force" (apparently referring to the "sudden stop operated both forward and backward") "so as to be thrown off the end of the car"?

In the first place, he does not say he "lost his balance": he says he was knocked or thrown off the car.

The "slick condition of the car" was neither increased nor diminished by the operation of any physical law. It was just as slick (but no slicker) whether respondent was thrown north or south. Consequently, that cannot affect the question.

We have demonstrated that respondent's "bracing" is not supported by the record. Thus he is left standing upon the slick runway of a box car, when (he says time after time) nothing happened except a sudden stop which threw or knocked him eight or ten feet in an impossible direction. But the court below, by the language just quoted, in effect says to respondent:

"You were entirely mistaken when you testified time after time that nothing happened except the violent stop which knocked you off over the end of the box car. You just do not know what happened. You were thrown forward by the sudden stop. You must have been, because physical law demands that result from its operation. You cannot recover upon that theory, however, because you fell in the wrong direction. That testimony of yours cannot be believed. Consequently, you were thrown forward by the primary violence, but did not fall or even lose your balance (so you say), but the secondary force (the rebound) knocked you eight or ten feet over the end of the car."

(e) In its opinion on petitioner's motion for a rehearing the Court below says:

> "Plaintiff's account was not as perfect a description as might have been made by a professor of English, but we think it was sufficient to show that there were forces operating both ways."

It does not require the command of English customarily associated with a teacher of that subject to state that one was thrown south rather than north, under the circumstances shown here. Any grade school student could and would have said so had that occurred. Respondent was a switchman of thirty years experience in riding upon the tops of freight trains, and admittedly has received many jars and folts while so engaged. If he had been thrown forward by the violent stop, he would not and could not have avoided saying so. He was represented by able counsel, who unquestionably would have seen to it that his testimony did no violence to the law of inertia had it been possible for them to have done so within the domain of truth. Moreover, it would have been the most natural thing in the world for respondent to have so stated had it been a fact.

It does not require the training of a professor of English to tell the truth on the witness stand. The strain on credulity is entirely too great to think that respondent ignorantly or unintentionally failed to say that he was given an extremely powerful impetus towards the south by the stop which he described as "terrific," such a stop as he had experienced but six or seven times in his thirty years service as a switchman (R. 48). As Judge Faris said in the Steele Case, supra:

> "The case presented is not one of a mere verbal discrepancy arising, it might be, from the manner of speech of the witness, but a vital and fatal variance made * * * deliberately."

(f) In the concluding paragraph of the original opinion of the Court below it is held that under this record the trial court had no right to instruct peremptorily for petitioner, as the jury had a right to pass on the questions of fact involved. Under the state of this record, this holding is manifest error, as there were no questions of fact raised by the evidence. If this case must be submitted to a jury, then there can never be an instructed verdict against any plaintiff.

It seems to have been the theory of the Court below that because all of the facts showed that respondent was in some manner knocked or fell from the car, the jury had a right to surmise or speculate that it was from petitioner's negligence, even though respondent's evidence failed to establish it. Note this language in the opinion:

> "It is true that plaintiff said it happened quickly (indicating with a snap of his fingers) but only such a sudden stop would likely have caused him to lose his balance."

Apparently the Court below took the position that because respondent stated his conclusion that there was a

sudden stop, every other possible cause for his fall from the car was excluded, despite the fact that his testimony showed conclusively that the stop did not cause the fall. Necessarily, if it is to be assumed that he was knocked off by some force over which he had no control, and petitioner had control; and in addition that the jury may disregard his testimony and may arbitrarily suppose that he did not accidentally fall, then a plaintiff is not under any duty to prove his case at all, and the defendant is completely helpless.

This is not the rule of this Court, which holds that "where the evidence is undisputed or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party." Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597; Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720; P. R. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819; Southern Ry. Co. v. Walters, 284 U. S. 190, 52 S. Ct. 58, 76 L. Ed. 239.

This Court discussed the rule at length in Chesapeake & Ohio R. Co. v. Martin, 283 U. S. 209, 215, 216, 217, 75 L. Ed. 983, 987, 988, where it is said:

> "In the face of this record the conclusion of the court that it was still open for the jury to say that not eight days merely, but twenty days, fell short of being a reasonable time for delivery is so clearly erroneous as to cause the ruling of the court, in effect, to rest upon nothing more substantial than the power of a jury arbitrarily to disregard established facts.
>
> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of

view is it open to doubt. The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of opinion that this was not enough to take the question to the jury, and that the court should have so held.

"It is true that numerous expressions are to be found in the decisions to the effect that the credibility of an interested witness always must be submitted to the jury, and that that body is at liberty to reject his testimony upon the sole ground of his interest. But these broad generalizations cannot be accepted without qualification. Such a variety of differing facts, however, is disclosed by the cases that no useful purpose would be served by an attempt to review them. In many, if not most, of them, there were circumstances tending to cast suspicion upon the testimony or upon the witness, apart from the fact that he was interested. We have been unable to find any decision enforcing such a rule where the facts and circumstances were comparable to those here disclosed. Applied to such facts and circumstances, the rule, by the clear weight of authority, is definitely to the contrary."

It is submitted that because the evidence of both respondent (R. 74) and petitioner (R. 96) shows that the train moved, if at all, only a few feet (respondent says only a foot or two, if at all), after he fell, that may be accepted as a fact. If so, then respondent's story of this happen-

ing cannot be true, because everyone knows a sixty-three car freight train, moving even as slowly as six to eight miles, cannot be stopped within that short distance. Therefore, the conclusion is inescapable that petitioner's theory of this occurrence is very highly probable, viz., that respondent waited until his train had stopped or had practically stopped, started to climb down the ladder on the north end of this box car, and, because he was blind in one eye, and the footing was slick and insecure, stepped over the end of the car as he approached the ladder which led from the top of the car to the ground. This theory does no violence to the evidence that the train moved only a foot or two after his fall; his own theory and that of the Court below (though contradictory to each other) do severe violence to his corroborated evidence (and the only portion which is corroborated) that the train moved only that distance, if at all, after the stop knocked him off the car.

In conclusion, petitioner submits that this record places no responsibility upon petitioner for respondent's unfortunate injury; the opinion of the court below is manifestly erroneous, and should not be permitted to stand.

Respectfully submitted,

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